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Supreme Court of the United States

OCTOBER TERM, 1947

No. 595

BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

HENRY PLOUGH,
Respondent.

No. 596

BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

MARJORIE A. HANSON, AS ADMINISTRATRIX OF THE ESTATE OF GORDON M. HANSON, DECEASED,
Respondent.

No. 597

BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

ELMER VAN SLYKE,
Respondent.

No. 598

BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

CAROLINE LYNCH, AS ADMINISTRATRIX OF THE ESTATE OF MYRON GEORGE LYNCH, DECEASED,
Respondent.

ANSWERS TO WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF ANSWERS.

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To the Hon. Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Respondents for their answers to the petitions for Writs of Certiorari respectfully show:

Statement.

The summary statement of the matter involved contained in the petition for Writs of Certiorari is substantially correct.

However, Respondents will point out in their Brief in support of these answers that although it may be true, as is stated by Petitioners in the summary statement, on page 3 thereof, that "the Trial Court admitted the testimony for the purpose of showing bias on the part of such employee," that it appears very clearly from the testimony that the purpose of Petitioners in introducing the evidence was to prejudice the jury and the emphasis by Petitioners in the trial was upon *payment* of the insurance.

The statement as to the "jurisdictional matters involved," on pages 3 and 4 of Petitioner's petition, and summed up on page 4 thereof under the heading "The question presented," indicates a misapprehension on the part of the Petitioners that the decision of the Circuit Court of Appeals resulted solely from the fact that the actions were consolidated.

The Court itself makes no such finding nor can such interpretation be read between the lines. The Court's reason is given very clearly in its opinion in pages 415 and 416 of the addendum to the record on appeal, in which the Court said: "We think, however, that admission in this case was an unwarranted extension of the undoubted right to show bias on the part of the witness by proof of a fact otherwise entirely foreign to the issues and harmful."

The Court goes on to detail the reasoning in that respect. It is clear from the language of the Court that the mere fact that the cases were tried together had no bearing upon their opinion, but it relied clearly on the distinction, as

pointed out in Respondents' Brief, between the attempt to show bias of a witness and the unnecessary attempt to show bias of a party whose interest is freely admitted.

ARGUMENT.

POINT I.

The District Court erred in the first instance in permitting evidence of compensation insurance upon the trial and reversal upon this ground by the Circuit Court was sound.

The first intrusion into the case of the highly prejudicial reference to compensation insurance occurred in the cross examination of Plaintiff-Appellant Plough (P. 88, Fols. 263 and following).

> "Q. You are friendly with the Iroquois Gas Company as your employer, are you not? A. Surely.
> "Mr. Moore: He is not on strike anyway.
> "By Mr. Combs:
> "Q. (Resuming to witness) You do know, do you not, of your own knowledge, Mr. Plough, that all of the men, including the men on the truck, were covered by New York compensation?
> "Mr. Moore: I object.
> "Mr. Brock: I object.
> "Mr. Combs: The Court has a case covering that.
> "The Court: 147 Federal (2) 621. It is 5 o'clock. I think we will suspend at this time until 10 o'clock tomorrow morning.
> "(Whereupon, a recess was taken until tomorrow morning, Wednesday, December 4, 1945, at 10 o'clock.)"

(Fols. 263-264.)

This is the kind of testimony that would call for a mistrial in any Trial Court. Not only was counsel for De-

fendant-Respondent able to get in at this point the fact that all the plaintiffs were covered by compensation and did not need a recovery in this action to make them whole, but the matter was further prejudiced by defendant's counsel stating, in the presence of the jury, that the Court had a case covering that point and by the Court's affirmation of the fact by appearing to give a legal citation of the case in the presence of the jury, thus giving the impression that the Federal Courts have sanctioned this very type of testimony.

The entire following discussion of the point in the Judge's chambers is printed in the record for the purpose of indicating the Court's interpretation of the case of *Sprinkle vs. Davis,* 111 Fed. 2nd 925, and also the agreement by counsel for the defendant that preclusion of this type of evidence by the New York State courts is a matter of substantive law (Fol. 277) all of which will be discussed at length below.

Compensation insurance is next mentioned in the continuation of the cross examination of Plaintiff Plough, on Page 104, folios 310-318.

It was the contention and the argument before the Court, and it will no doubt be made again before this Court, that the whole purpose of this testimony is to show that the Plaintiffs were friendly with their employer and that their testimony was biased in order to save the employer's money.

This point will be fully discussed below, but it appears particularly obvious from the following testimony that defendant's counsel was most anxious to have the jury know that the Plaintiffs were *paid* compensation and therefore did not need a recovery in this case.

In folio 310 Defendant's counsel, by his question brings out the fact that the Plaintiffs were all covered by Workmen's Compensation of the State of New York.

In folio 312 counsel pressed the point that Plaintiff Plough actually received compensation during his period of disability. (This clearly not on a question of bias but on question of actual compensation received.)

Further, in folio 312, counsel in the form of a question actually made the following exclamatory statement:

> "Q. Why, Mr. Plough, you appeared in Compensation Court before the Board and had an award made to you, and *were paid by the Iroquois Gas Company* your compensation by the State of New York?"

In the following folios the question is further labored, and again in folios 314-315 defendant's counsel insisted:

> "Q. You received it? A. Yes.
> "Q. That was paid by the Iroquois Gas Company, was it not? A. Yes, sir."

In Folio 316 Defendant's counsel again states:

> "Q. You know that money was paid by your employer? A. Mine was."

Under Folio 317 Defendant's counsel stated:

> "Q. Do you also know that Mr. Van Slyke will have to be paid under that law by the employer as long as he is disabled? Do you know that?"

In the summation to the jury by Mr. Combs, counsel for the Defendant (Fol. 1062 and following) he made a very great point of the interest of the employer, Iroquois Gas Company in this law suit.

Counsel for the Plaintiff Plough asked the Court to direct counsel for the Defendant to desist from continuing this line of argument and the Court (Fol. 1065) said: "As

the jury well knows, the Iroquois Gas Company is not a party. Otherwise I deny your request." This again was prejudicial error. Denial of this request again gave sanction before the jury to Defendant's attitude on the whole question of compensation and the interest of the employer, which clearly had no bearing upon the case.

The error in admitting the evidence of compensation insurance was imbedded even more deeply by the Court's charge (Fol. 1215), in which the Court says that this evidence was received solely on the question of credibility. He then goes on to say in the next paragraph: "If you arrive at a verdict in favor of the plaintiffs, no reduction should be made by reason of what you might assume was paid through any compensation act." This resulted again in emphasizing the fact that the Plaintiffs did receive payment of some kind for their injuries.

Apparently this evidence of compensation insurance was admitted by the Court as tending to show bias on the part of the Plaintiffs. The Court so stated as appeared in the printed discussion of the matter in the Judge's chambers and from his attitude in connection with the objections raised.

This was a complete misconception of the law and of the attitude of the Federal Courts in the few cases in which this type of evidence had been admitted. Where it has been admitted the Courts have been very careful to state that it was done to show the bias of a *witness*. Clearly there is no question of bias of a *party*. *A party has an interest which is far greater than bias.* Bias is merely an inclination. It is not necessary to prove the interest of a party, or that, to misuse the English language, he is biased in his own favor. The Court itself in this case charged the jury on the question of interest. (p. 396, Fol. 1187.)

"You may also take into consideration in considering the testimony of any witness,—whether Plough or Lynch, Van Slyke or any other, or Kessler,—the motive they had in testifying as they did. It is a natural result that if we have an interest, we may be inclined to represent the situation a little more favorably than one who has no interest."

Clearly the jury was warned that the parties had an interest and therefore the truth of their words must be weighed with that in mind. Will Defendant's counsel and the Court now say that we have come to that happy state in society in which an employee has a greater concern for his employer's interest than for his own?

Let us look at the cases. The case upon which Defendant's counsel relies and which was shown to the Court was *Sprinkle vs. Davis,* 111 Fed. 2nd 925. In that case the plaintiff, an employee of the Virginia State Highway Department, was injured by defendant's automobile. Defendant offered to prove that the injured man had received Workmen's Compensation payment as an employee of the highway department, contending that this fact should be made known to the jury in order to show the bias of other employees of the Department who testified for the plaintiff. The Circuit Court of Appeals for the Fourth Circuit held such evidence admissible, upon the principle that "parties to a cause have the right to show the bias and interest of the witnesses—Under this rule, the fact that a witness is employed by a party to the suit is regarded as a relevant circumstance".

Clearly what the Court meant in that case was that the bias of the witnesses, *other than the plaintiff,* could be shown by their employment. In our case the other witnesses are also parties whose interest is admitted. The same point

was raised in *Majestic vs. Louisville & N. R. Co.*, 147 Fed. 2nd 621, in which the Circuit Court of Appeals, 6th Circuit held that it was proper to ask a witness for the plaintiff, who was a co-employee, whether or not plaintiff was receiving compensation for his injuries. There the Court made the following interesting statement:

> "While the rule excluding any testimony or statement to the effect that a plaintiff in a personal injury action is insured against loss on account of the injury should be strictly adhered to and rigidly enforced, still, in applying it, the Court must give weight to the equally important rule of the undoubted right of a party to cross examine witnesses to show their interest or bias."

From this statement we gather clearly that the Court recognizes the importance of the principle preventing evidence of insurance, and will only permit this evidence in showing the bias of a *witness*. Surely the Court in that case would not have stultified itself in making the preamble which it did if the *witness* involved were a *party*. That, in effect, would be to say, "The rule excluding testimony that a party is insured should be strictly adhered to but in applying it the Court must also give weight to the right to cross examine a party to the action whose interest is obviously admitted to show that interest"—which would be to say that we can destroy a most valuable right in a party in order to prove that which has already been admitted.

In all the Federal Court cases, counsel for the plaintiffs has examined, the only instances of the relaxation of the rule permitting testimony as to compensation or other insurance has been to permit the evidence of bias of a witness, not a party.

See

Wabash Screen Door Co. vs. Black, 126 Fed. 721.

See

Eppinger & Russell Co. vs. Sheely, 24 Fed. 2nd 153.

That the Federal Courts have recognized the distinction urged here appears most clearly in *Majestic vs. Louisville & N. R. Co.* (*Supra*), in which the Court said:

> "Facts wholly immaterial or prejudicial to one of the parties on the main issue of a case may be material as affecting the credibility of a witness".

Obviously, the Court meant a witness, not a party. Therefore, it is clear that the Federal Courts themselves would not permit the admission of evidence of this kind.

It is almost unnecessary to review the vehemence with which the Courts of the State of New York have excluded such evidence. Perhaps the clearest statement in New York State appears in *Regan vs. Frontier Elevator & Mill Co.* (4th Department) 211 App. Div. 164; 208 N. Y. S. 239, where it stated:

> "Such insistence by defendant's counsel on the plaintiff's right under the Workmen's Compensation Law as occurred in this case might well influence the jury toward the erroneous view that the plaintiff's loss should find compensation in part at least from his employer under the provisions of that statute. Posnick v. Crystal, 181 App. Div. 660, 168 N. Y. S. 868. The situation is analogous to that which arises when reference is made on behalf of plaintiff to defendant's protection by insurance. The courts have long and consistently condemned such practice in vigorous terms."
>
> "We find no distinction in the fact that casualty insurance is wholly voluntary and workmen's compensation insurance compulsory. In either case the mat-

ter is equally immaterial to the judicial inquiry in progress. Neither are we impressed by the fact that the employer or his servants, if sworn, might be deemed interested witnesses, because of the provisions of the Workmen's Compensation Law. We deem such interest too remote to justify opening the gates to a flood of dangerous and illegitimate inferences and arguments to confuse the jury."

This is clearly a rule of substance in New York State and not purely one of evidence. This appears most clearly from the above cited case of *Regan vs. Frontier Elevator & Mill Co.* In that case the Appellate Court reversed for the admission of this evidence *even though the admission of the evidence was not objected to by the plaintiff.*

The Court said, at page 165:

"It is true that on neither occasion was a ruling made to which exception was taken. No question of law is presented by the record in this respect. But the very asking of an improper question for an ulterior purpose or the statement to the jury of extraneous prejudicial facts or argument may constitute such error of fact as to justify the Trial Court or Appellate Division in setting aside the verdict in the interests of justice."

See

Zimber vs. Kress, 225 A. D. 16 (232 N. Y. S. 46).

Posnick v. Crystal, 181 App. Div. 660 (168 N. Y. S. 868).

Coutts v. Christopher, 233 A. D. 136 (251 N. Y. S. 291).

It appears clearly from the decision in the above cited Regan case and the other cases referred to that it is clearly the policy of the New York State Courts to exclude this testimony and that it is more than a matter of mere evidence.

Certainly the United States District Court, sitting in New York, should follow this rule. See the ruling in *Tompkins vs. Erie R. Co.*, 304 U. S. 64.

It is further respectfully submitted that such a ruling is within the meaning of the Tompkins case, as interpreted by Honorable Charles E. Clark in *24 Journal American Judicature Society,* 158 (1941), in which it is stated that the Federal Courts are not required to hold that an issue traditionally procedural, or on the borderline, is substantive *unless the public policy of the State is unequivocally disclosed by some clear State statute or decision demanding such a result.*

There can be no doubt about the policy of the New York State Courts on this issue.

POINT II.

The decision of the Circuit Court is not dependent upon the consolidation of the actions.

The Circuit Court demonstrated no reliance whatsoever upon the fact that the cases were consolidated, but reversed because of unnecessary prejudicial evidence admitted.

The logic of the earlier decisions of the District Courts and of the Circuit Court in this case is clear.

This type of evidence is so highly prejudicial that if it be admitted at all it must be admitted only where there can be shown a strong supervening need in a particular case to impeach the witnesses to show their bias.

In this case it was a matter of fact that the witnesses, whom Petitioners sought to impeach, upon the ground of bias were all parties to the action and that obviously it

could serve no purpose to Petitioners to attempt to show any bias on their part inasmuch as they were admittedly interested parties.

No one will seriously claim that one's bias in favor of an employer is or can be greater than one's self-interest.

Hence, the type of evidence attempted to be adduced by the Petitioners was directed simply and surely to the jury's prejudice, namely, that these people have been paid once and should not be paid again. Such evidence could not serve a proper legal purpose and its admission was clear error.

It is respectfully submitted that these petitions for Writs of Certiorari should be denied.

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